STATE OF WISCONSIN CIRCUIT COURT BRANCH 15 DANE COUNTY

THE LEAGUE OF WOMEN VOTERS OF WISCONSIN, et al.,

Plaintiffs,

Case No. 19-CV-00084

v.

DEAN KNUDSON, et al.,

Defendants.

DEFENDANT TONY EVERS' BRIEF IN OPPOSITION TO THE LEGISLATURE'S PROVISIONAL MOTION TO DISMISS

INTRODUCTION

In December 2018, members of the Wisconsin Legislature convened at what has been dubbed the "December 2018 Extraordinary Session." At that gathering, numerous acts were purportedly taken—laws passed and appointments confirmed. Plaintiffs and the Governor contend that that gathering was illegitimate, not a meeting of the Legislature "provided by law," and therefore in violation of the Wisconsin Constitution.

This brief responds to the Legislature's Provisional Motion to Dismiss and brief in support of that motion. In Section I, the Governor demonstrates why the Legislature is wrong on the merits. In Section II, the Governor shows that he has standing to challenge the "Extraordinary Session" and hence all actions taken during that gathering. As the United States Supreme Court has explained, "The Constitution…is concerned with means as well as ends. The Government has broad powers, but the

means it uses to achieve its ends must be 'consist[ent] with the letter and spirit of the constitution.'" *Horne v. Dep't of Ag.*, ___ U.S. ___, 135 S. Ct. 2419, 2428 (2015) (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 421, 4 L.Ed. 579 (1819)). Even "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way." *Id.* (quoting *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 416, 43 S. Ct. 158 (1922). The Extraordinary Session was not a meeting of the Legislature; it was a shorter cut than is allowed by the Wisconsin Constitution. Hence the Legislature's motion should be denied.

ARGUMENT

I. The Plaintiffs' complaint states a claim upon which relief can be granted.

The Legislature has moved to dismiss Plaintiffs' complaint, asserting that it fails to state a claim upon which relief can be granted under Wis. Stat. § 802.06(2)(a)6. (Leg. MTD, Doc. 107.) Such a motion tests the legal sufficiency of the complaint. *Scott v. Savers Property and Cas. Ins. Co.*, 262 Wis. 2d 127, 663 N.W.2d 715, (2003). "A complaint will be dismissed only if it appears certain that no relief can be granted under any set of facts that the plaintiffs might prove in support of their allegations." *Id.* For the purposes of the motion, all facts pleaded and all reasonable inferences from those facts are admitted as true. *Id.* "[I]f the facts pleaded reveal an apparent right to recover under *any* legal theory, they are sufficient as a cause of action." *State* ex rel. *Luedtke v. Bertrand*, 220 Wis. 2d 574, 579, 583 N.W.2d 858, 860 (Ct. App. 1998), *aff'd*, 226 Wis. 2d 271, 594 N.W.2d 370 (1999).

The Plaintiffs have stated a claim on which relief can be granted. In fact, as explained in Governor Evers' Response to Plaintiffs' Motion for Temporary Injunction (Gov. T.I. Br., Doc. 98, pp. 9-24), which is incorporated herein by reference, Plaintiffs have a likelihood of success on the merits of their claim that the December 2018 Extraordinary Session ("Extraordinary Session") violated Article IV, Section 11 of the Wisconsin Constitution.

A. The Extraordinary Session was *ultra vires* because it did not meet at a "time...provided by law."

Wisconsin's Constitution restricts the Legislature to meeting "at the seat of government at such time ***as shall be provided by law***, unless convened by the governor in special session." Wis. Const. art. IV, § 11. (emphasis added). As explained below in Section I.A.1, this means that the Constitution requires all meetings of the Legislature to occur at a time ***actually*** provided ***by law***. (See also Gov. T.I. Br., pp. 11-14.) The Extraordinary Session was constitutionally invalid because the Legislature did not create such a meeting ***by law***. The law enacted by the Legislature to implement the authority granted to it by Article IV, § 11 provides only for ***regular*** session meetings of the Legislature.

For several reasons, the Extraordinary Session was not part of the Legislature's regular session. First, no law makes extraordinary sessions part of the regular session. Second, extraordinary sessions cannot be part of regular sessions because they only occur during regular session adjournments. Third, extraordinary sessions are

conceptually mutually exclusive from regular session meetings (or "floorperiods"). (See Gov. T.I. Br., pp. 14-20.)

The Legislature identifies no valid, specific authority for extraordinary sessions. Confronted with this vacuum, the Legislature also fails to support its central argument—that it did not need specific authority from a law enacted by a vote of both houses of the legislature because it could rely on a vague and supposed general authority to do whatever it pleases during a biennial session that was "continuous." That argument is contrary to, and a distraction from, the law.

Moreover, even if a regular session ***could*** include an extraordinary session generally, this Extraordinary Session was not part of the 2018 regular session, which was already terminated, along with the Legislature's power to call itself into any session, by adjournment *sine die*.

1. The Constitution requires all meetings of the Legislature to occur at a time *actually* provided by statute.

In interpreting the Constitution of the State of Wisconsin, "[t]he authoritative, and usually final, indicator of the meaning of a provision is the text—the actual words used." *Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, Dep't of Workforce Dev.*, 2009 WI 88, ¶ 57, 320 Wis. 2d 275, 310, 768 N.W.2d 868, 885. When courts require further indicia of the text's meaning, they also consult "the constitutional debates and the practices in existence at the time of the writing of the constitution; and the earliest interpretation of the provision by the legislature as manifested in the first law passed

following adoption." *Wagner v. Milwaukee Cty. Election Comm'n*, 2003 WI 103, ¶ 18, 263 Wis. 2d 709, 723, 666 N.W.2d 816, 824 (quotation omitted).

In this instance, the plain text is sufficient to interpret the provision. A meeting is "provided by law" only when a law directly "supplies," "furnishes" or "makes available" the time of the meeting.[1] (Gov. T.I. Br. at 11-12.) This phrase thus has a decidedly different meaning than language about a meeting "provided *for* by," law, which means "in accordance with" or "not inconsistent with" the law. (*Id.*) The Legislature would prefer the Court to read the actual language of the Constitution as "provided *for* by," "in accordance with," or "not inconsistent with" the law. That is not what it says.

Moreover, the Constitution narrowly defines "law" as a properly-styled bill that passes both houses of the Legislature, is signed by the governor (or passed by a supermajority over his veto), and is published. Wis. Const. arts. IV, § 17; V, § 10. Thus, only by statute, not by joint resolution or rule, may the Legislature provide anything "by law." *State v. City of Oak Creek*, 2000 WI 9, ¶ 27, 232 Wis. 2d 612, 629, 605 N.W.2d 526, 534 ("the drafters meant statutory law when they used the phrase, 'provided by law'"). (See also Pls' T.I. Br., Doc. 86, at 10.)

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[1] *See* https://www.dictionary.com/browse/provide; https://www.merriam-webster.com/dictionary/provide; *Barritt v. Lowe*, 2003 WI App 185, ¶ 10, 266 Wis. 2d 863, 870, 669 N.W.2d 189, 192. *See also Black's Law Dictionary* 1224 (6th ed. 1990), defining "provide" as "[t]o make, procure, or furnish for future use, prepare; To supply; to afford; to contribute," and noting that "provided by law," "when used in a constitution or statute, generally means prescribed or provided by some statute."

Unable to deny this plain language interpretation of "provided by law," the Legislature simply refuses to confront the phrase altogether. It admits that the Extraordinary Session resulted from a procedure provided by joint rule rather than law, but calls this distinction a "legally irrelevant distraction." (Leg. MTD Br., Doc. 103, p. 19). The Wisconsin Constitution is not a "legally irrelevant distraction," and its plain reading proves Plaintiffs' claim. "By law" means a law enacted as the Wisconsin Constitution prescribes, no more and no less.

2. The only properly enacted "law" provides for regular session meetings of the Legislature, not extraordinary sessions.

The Legislature has, generally speaking,[2] provided "by law" the time of only two full legislative meetings. One is a meeting for the Legislature "to take the oath of office, select officers, and do all other things necessary to organize itself for the conduct of its business." Wis. Stat. § 13.02(1). That organizing meeting is held on the first Monday in January in each odd-numbered year, unless that day falls on January 1 or 2, in which case it is held on January 3 instead. *Id.*

The second meeting provided "by law" is the regular session itself. Wis. Stat. § 13.02(2). The regular session "commence[s] at 2 p.m. on the first Tuesday after the 8th day of January in each year unless otherwise provided under sub. (3)." *Id.* As a result, the only legitimate meetings of the full bodies of the Legislature are the organizing

[2] As discussed *infra*, in Section I.D., extraordinary sessions appear to have been provided by law in an extremely narrow set of circumstances not present in the Extraordinary Session. *See* Wis. Stat. § 196.497(10)(c); 1987 Wisconsin Act 4. Thus, general references in this brief to "extraordinary sessions" intentionally exclude these outlier statutes for the sake of clarity and efficiency.

meeting, the regular session, and any special session called by the governor.[3] (See also Gov. T.I. Br. at 12-14.)

3. The Extraordinary Session was not part of the Legislature's regular session.

For several reasons, the 2017 and 2018 regular sessions—the only sessions provided by law—did not include the Extraordinary Session.

First, the Extraordinary Session was not made part of the regular session by any law. (See also Gov. T.I. Br. at 14-15.) Second, extraordinary sessions of the Legislature are also clearly distinct from regular sessions because they can only occur ***during adjournments of*** the regular session. (See also Gov. T.I. Br. at 15-17.) Third, extraordinary sessions are distinct from regular session meetings and floorperiods both as a matter of scheduling and conceptually, being initiated and closed differently, recorded separately, subject to different rules, and serving narrower purposes. (See also Gov. T.I. Br. at 17-19; Joint Rule 74(2); Joint Rule 81(2)(c); Senate Rule 93; Assembly Rule 93; Assembly Rule 98(1).)

Thus, the 2018 regular session of the Legislature did not include the Extraordinary Session. Notably, the Legislature does not argue that it did, although it

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[3] As Plaintiffs have demonstrated, the right of the Legislature to determine the rules of its own proceedings does not excuse the Legislature, even in interpreting or applying the rules of its proceedings, from its duty to conform its rules and actions to the Constitution, or this court from its duty to enforcing the Constitution as to those rules and actions. (Pls' T.I. Br. at 11-13. *See also Milwaukee Journal Sentinel v. Wisconsin Dep't of Admin.*, 2009 WI 79, ¶¶ 18-20, 319 Wis. 2d 439, 456–58, 768 N.W.2d 700, 708–09 ("[E]ven if the statute might otherwise be characterized as a legislative rule of proceeding, we may interpret the statute and apply it to the legislative action to determine whether that action complies with the relevant constitutional mandates.")

does, as discussed below, argue that the Extraordinary Session was part of a "continuous" biennial session, something that does not, in fact, exist.

4. The Legislature fails to identify a specific, valid law that allows for extraordinary sessions.

As explained, *supra*, in Section I.A.2, there are only two laws that provide meetings of the legislature: Wis. Stat. § 13.02(1) and Wis. Stat. § 13.02(2). Yet, when the Legislature attempts in its brief to connect extraordinary sessions back to an actual law, it does so only through a complex and dysfunctional daisy chain that connects to ***neither*** of these provisions.

The chain goes as follows:

- Article IV, Section 11 – the Constitutional requirement that a session meeting provided is by law;
- to Wis. Stat. § 13.02(3) – a statutory provision requiring only a general scheduling meeting of a particular committee;
- to 2017 Senate Joint Resolution 1 – that scheduling meeting's work product, which law requires neither passage of nor adherence to, and which mentions extraordinary sessions as a possibility but does not actually schedule any;
- to Joint Rule 81(2) – which the Legislature describes as the authorizing authority for extraordinary sessions.[4] (Leg. MTD Br. at 19.)

[4] This does not even include the action, provided in Joint Rule 81(2), that actually creates an individual extraordinary session: the vote "of a majority of the members of the committee on organization in each house or by the adoption of and concurrence in a joint resolution on the approval by a majority of the members elected to each house, or by the joint petition of a majority of the members elected to each house submitted to, and using a form approved by, the senate chief clerk and the assembly chief clerk." Jt. Rule 81(2)(a).

Thus, the Legislature has described extraordinary sessions only as a potential event, and only by rule through joint resolution. Yet it is only by statute, not by joint resolution or rule, that the Legislature provides anything "by law." (*See* Pls' T.I. Br. at 2-3, 10.) The Legislature's argument thus ignores the fatal difference between "law" and its internal operating policies and procedures that it relies upon instead. Further, to the extent a law is even ***involved*** in the Legislature's argument, it is a law that provides nothing more than a committee scheduling meeting, not a Legislative session.

5. The Legislature posits false constitutional and statutory authority for extraordinary sessions.

Tacitly acknowledging its inability to fit extraordinary sessions into the meetings actually provided by law, the Legislature claims that it is ***always*** in session. That claim distorts the Constitution, the statute, and historical fact.

a. The Legislature attempts to distract the Court from the text of Article IV, Section 11 of the Wisconsin Constitution.

The Legislature attempts to distract the Court from the plain language of the Constitution's Article IV, Section 11 by inflating the significance of the 1968 amendment to that section, arguing that "the Legislature has used the flexibility afforded under the 1968 amendment to remain in continuous session throughout the biennial period, adjourning only when the next biennial session begins." (Leg. MTD Br. at 4.) However, the Legislature does not—and cannot—support this assertion.

The 1968 amendment left untouched the requirement that "legislature shall meet at the seat of government at such time as shall be provided." The amendment merely excised only the seven words that followed that phrase: "once in two years, and no

oftener." *See State ex rel. Thompson v. Gibson*, 22 Wis. 2d 275, 289, 125 N.W.2d 636, 643 (1964). As the Legislature admits in its brief, before the 1968 amendment, the Legislature already would customarily "recess for extended periods" during the regular session, so the regular session could span many meetings. (Leg. MTD Br. at 3.) In other words, the only legal effect of the amendment was to allow the Legislature to conduct sessions in ***both*** years of a biennium, not just one.

b. The Legislature distorts Wis. Stat. § 13.02(3).

The Legislature mischaracterizes Wis. Stat. § 13.02(3) as "the Legislature's implementation of the 1968 amendment to Article IV, Section 11." (Leg. MTD Br. at 4, 16.) Subsection 3 merely requires a meeting of the joint committee on legislative organization to develop a work schedule for the Legislature, not a meeting of the Legislature itself. That activity is entirely independent of the mandate of the 1968 constitutional amendment, which required no "implementation" by the Legislature. To the extent that the amendment's flexibility was ***utilized*** by the Legislature, that occurred by its addition of the prefatory language of Wis. Stat. § 13.02—that the "legislature shall meet annually"—and by the amendment to Subsection (2), which removed the phrase "odd-numbered" year from its requirement for the Legislature's regular session meetings. (See Ch. 15, Laws of 1971, attached hereto as Exhibit A.)

Wis. Stat. § 13.02(3) has no interaction with Article IV, Section 11 of the Constitution at all. Rather, it is Wis. Stat. § 13.02(1) and (2) that fulfill Section 11's mandate that the Legislature set meetings "at such time as shall be provided by law." Wis. Stat. § 13.02(1) sets a meeting and time for the Legislature "to take the oath of

office, select officers, and do all other things necessary to organize itself for the conduct of its business." Wis. Stat. § 13.02(1). The second meeting and time provided "by law" is the regular session itself. Wis. Stat. § 13.02(2).

In sharp contrast to these two subsections, § 13.02(3) sets neither a meeting of the Legislature nor a time for the Legislature's meeting.[5] This statutory subsection, therefore, cannot be the source of the Legislature's compliance with the Constitution. Neither, as the Legislature argues, is there a "simple path from Article IV, Section 11 to Section 13.02(3) to 2017 [Senate Joint Resolution 1]" (Leg. MTD Br. at 17), because the only thing "***provided by law***" in this chain is a meeting of the joint committee on legislative organization—not a meeting of the Legislature, and certainly not an extraordinary session.

c. The Legislature misconstrues Wis. Stat. § 13.02(1).

The Legislature alternatively, and incorrectly, argues that Wis. Stat. § 13.02(1) is the source of its authority for extraordinary sessions, misstating that 13.02(1) requires that "'the legislature shall convene its biennial session" on the first Monday in January each year. (Leg. MTD Br. at 14.) In fact, that meeting is ***not*** for opening a ***session***, but rather "to take the oath of office, select officers, and do all other things necessary to organize itself for the conduct of its business." It is, instead, the later meeting provided

[5] The only way in which Wis. Stat. § 13.02(3) is even ***related*** to Article IV, Section 11 of the Constitution is that it allows the joint committee on legislative organization to move the regular session commencement date provided in Wis. Stat. § 13.02(2).

by Wis. Stat. § 13.02(2) that commences a session. That session is, explicitly, the ***regular*** session—the likely reason that the Legislature ignores it here.

d. The Legislature misinterprets other constitutional indicia.

The Governor agrees with the Legislature that the plain text of Article IV, Section 11 of the Constitution is dispositive here. That text favors the Plaintiffs' and Governor's positions in this litigation.

The Governor disagrees that other factors, even if they were appropriate to consider, favor the Legislature's position. As explained above, the language at issue here is the language that was in place long before the 1968 Amendment. The Legislature offers nothing in support of its position from other sources on either the original Constitution or the 1881 Amendment. Even when looking to the 1968 Amendment, however, no other relevant sources contradict the plain meaning of the text and rescue the constitutionality of extraordinary sessions.

First, the Legislature posits no "historical analysis of the constitutional debates relative to the position under review." *See Coulee Catholic Sch.*, 2009 WI 88 at ¶ 57, n. 25.

Second, the notion that each moment of the biennial session period is entirely inhabited by a "single, continuous biennial session" is not supported by the "contemporary sources" of the Constitutional amendment that the Legislature cites. (See Leg. MTD Br. at 16.) The 1968 Amendment did give the Legislature flexibility in deciding "when it should meet" and allowed it "to work year-round," in that floor periods of the regular session could potentially be scheduled throughout the biennial session period and not just, as before the amendment, in a single year of it. But these

sources evince no understanding that the Legislature would be continuously in session. In fact, the anticipation that there would at least be "summer recess[es]" indicates that it would ***not*** be in a continuous session.

As Plaintiffs have observed, contemporaneous sources show that the intent of the Constitution was for the Legislature to conduct its session within a "pre-planned" and "precise schedule" of work periods. (Pls' T.I. Br. at 14-15.) That clearly contravenes the possibility that the regular session would run continuously throughout the entire biennial session period. Further, extraordinary sessions are anything but precisely scheduled or pre-planned under Wis. Stat. § 13.02(3).

The "prevailing practices when the provision was adopted" and "first laws passed that bear on the provision" likewise are unavailing to the Legislature. The joint resolutions that the Legislature points to break the biennial session period into floorperiods, which are demarcated by adjournments. A session that is adjourned is obviously ***not*** continuous; instead, the Legislature is not in session in the many long gaps between floorperiods.

Significantly, the Legislature's exclusive reliance on the history of joint resolutions (Leg. MTD Br. at 16) underscores the fact that it can point to no "first *laws*" – or any *laws* – in support of their contention and, thus, cannot show that extraordinary sessions are provided by law in accordance with the Constitution. The Legislature describes 2017 Senate Joint Resolution 1 as "the joint resolution that defeats [Plaintiffs'] case." (Leg. MTD Br. at 16.) In fact, this reliance on a joint resolution defeats the ***Legislature's*** case, because a joint resolution is not a "law." (See Section I.A.1, *supra.*)

e. The Legislature ignores relevant portions of Wis. Stat. § 13.02.

The Legislature further attempts to distort the meaning of Wis. Stat. § 13.02 by ignoring its content. It argues that the "relevant portions for purposes of this litigation are Subsections (1) and (3)." (Leg. MTD Br. at 4.) In fact, the statute's other two subsections, which the Legislature entirely ignores, are most relevant to understanding how the Extraordinary Session fails to pass constitutional muster.

1. Wis. Stat. § 13.02(2) schedules the regular session.

First, the Legislature ignores Subsection (2), which provides: "The ***regular*** session of the legislature shall commence at 2 p.m. on the first Tuesday after the 8th day of January in each year unless otherwise provided under sub. (3)" (emphasis added). The Legislature skips over this because Wis. Stat. § 13.02(2) does for the regular session what no law does for an extraordinary session: provide a time for session commencement by law, in compliance with the Constitution. It is precisely by ignoring that fact, and § 13.02(2) in general, that the Legislature makes the entirely erroneous statement that it "has not enacted any other law specifically authorizing" regular session floor periods either. (Leg. MTD Br. at 18.)

The Legislature does not appear to understand that 2017 Senate Joint Resolution 1 was not needed to "authorize[] prescheduled floor periods" (Leg. MTD Br. at 19) because no joint resolution ***could*** authorize them. Yet, just so long as those floor periods are floor periods of the regular session, they were duly authorized by Wis. Stat. § 13.02(2).

2. Wis. Stat. § 13.02(4) terminates even-year sessions.

Crucially, the Legislature also ignores Subsection (4), which provides that "measures introduced in the regular annual session of the odd-numbered year which do not receive final action shall carry over to the regular annual session held in the even-numbered year." If there was only one continuous session that occupied the entirety of the biennial session period, as the Legislature now posits, that statutory subsection would be surplusage. "Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 663–64, 681 N.W.2d 110, 124.

The statute's specific prescription that there is continuity from the odd-year session to the even-year session shows that such continuity does ***not*** exist from the even- to odd-year sessions. *See Gottlieb v. City of Milwaukee*, 90 Wis. 2d 86, 95, 279 N.W.2d 479, 483 (Ct. App. 1979) (applying the rule of *expression unius est exclusion alterius*). The regular session in an even-numbered year is terminated after the final adjournment of a scheduled session. As Plaintiffs have observed, the Legislature confirmed this by its own behavior in officially recognizing that all bills that had not been passed by both houses of the Legislature at the end of the spring 2018 floorperiods were adversely disposed of at that time. (See Pls' T.I. Br. at 17.)

f. The Legislature blurs distinctions between different uses of the word "session."

There are meaningful distinctions between the different uses of the word "session," evidenced by the various relevant terms of art: "regular session," "biennial session period," and "extraordinary session." The Legislature's arguments distort these various terms of art and ignore their meaningful differences.

First, throughout its brief in support of its motion to dismiss, the Legislature attempts to bolster its claim that it is always in session by repeatedly ignoring the words that appear before and after the word "session." For instance, the Legislature states that 2017 Senate Joint Resolution 1 explains that "the Legislature 'me[]t' for the 2017-2018 biennial session on January 3, 2017 and did not stop meeting until January 7, 2019." (Leg. MTD Br. at 1.) The joint resolution says no such thing. Rather, it provides that "the biennial session ***period*** began on Tuesday, January 3, 2017," and that "the biennial session ***period*** ends at noon on Monday, January 7, 2019." This difference is instructive.

Section 13.02(3) of the Wisconsin Statutes requires that the joint committee on legislative organization meet and develop a work schedule, and for this meeting to take place "early in each ***biennial session period***." (emphasis added). There is no reference to **a *regular session*** in this subsection. This choice of words is highly significant and must be given effect. *Kalal*, 2004 WI 58 at ¶ 46. Regular sessions thus comprise only a subset of time within the "biennial session period."[6] (See Gov. T.I. Br. at 15-16.) The Legislature

[6] 2017 Senate Joint Resolution 1 also recognized this distinction, providing that "the ***biennial session period*** of the 2017 Wisconsin legislature began on Tuesday, January 3, 2017, and that the ***biennial session period*** ends at noon on Monday, January 7, 2019." 2017 Senate Joint Res. 1, § 1(1) (emphasis added).

ignores this. It uses the term "biennial session period" in its brief only on the six occasions that it is forced to because the term appears in a statute or joint resolution it is quoting.

Likewise, the Legislature also completely dodges the use of the term "regular session," except where it cannot be avoided when quoting a statute. (See Leg. MTD Br. at 5, n. 4 and 19, n. 7.) Instead, the Legislature speaks simply of the "biennial session" on 26 occasions in its brief and "biennial period" another three, generally by the way of distorting the terms "biennial session period" or "regular session" actually used in the referenced law or resolution.[7] (See, e.g., Leg. MTD Br. at 1, 3, 18.)

Likewise, the Legislature stresses that it created the concept of extraordinary sessions years ago and that they are specifically referred to in many legislative documents, rules, and resolutions. (See, e.g., Leg. MTD Br. at 5.) The Legislature ignores the fact that it never enshrined this term in ***law***. Instead, the Legislature argues that the "***joint resolution*** specifically provides that the Legislature has the authority to 'convene an extraordinary session.'" (Leg. MTD Br. at 7 (emphasis added).) Yet, as discussed above, joint resolution is not "law," and non-law authority does not pass constitutional muster.

To further confuse the issue, the Legislature uses in its brief the wholly invented phrase "non-prescheduled floor period" 20 times in an effort to mask the difference

[7] Although the Legislature may wish to seek authority in Joint Rule 81's use of the term "biennial session," the rule, as Plaintiffs and the Governor have explained, is not law and can neither alter the plain meaning of contradictory statutory language or satisfy the Constitution's requirement for provision "by law." Moreover, not even the rule states that extraordinary sessions are part of "regular sessions."

between extraordinary sessions and floorperiods of the regular session. In fact, prior to this lawsuit, in its operations, the Legislature has consistently used the term "extraordinary session" in ***contrast*** to the term "floorperiod," because it has consistently recognized extraordinary sessions as different from regular session floorperiods. (See, e.g., 2017 Senate Joint Res. 1.) Try as it might, the Legislature cannot escape from the fact that an "extraordinary session" is just what it claims to be—a type of session, not currently provided by law, in contrast to the regular session, which ***is*** provided by law.

g. The Legislature ignores its own adjournments.

The Legislature's argument that it is always in continuous session ignores the fact that the Legislature regularly adjourns itself. Its declaration of a two-year biennial session ***period*** notwithstanding, the 2017-18 Legislature has taken no concrete action to "remain in continuous session, adjourning only when the next biennial session begins." In fact, it adjourns frequently—at the end of every single day in which it meets on the floor. *See, e.g.*, Wis. Senate J., 103rd Reg. Sess., at 755 (Wis. 2018); Wis. Assemb. J., 103rd Reg. Sess., at 825 (Wis. 2018).[8]

The Legislature argues that "[t]he period that [2017 Senate Joint Resolution 1] spelled out—January 3, 2017 through January 7, 2019—is the Legislature 'meet[ing] at the seat of government at such time as shall be provided by law.'" (Leg. MTD Br. at 15,

[8] Available at https://docs.legis.wisconsin.gov/2017/related/journals/senate/20180220; https://docs.legis.wisconsin.gov/2017/related/journals/assembly/20180221. The Senate votes that "the [numbered biennium's] Regular Session of the Senate stands adjourned" until the next scheduled meeting, underscoring that the regular session itself is adjourned upon the particular meeting's closure.

18.) That statement is plainly wrong, not only because a joint resolution is ***not*** a law as defined by the Constitution, but because the joint resolution itself makes it clear that during the vast majority of the biennial session period, the Legislature is ***not*** meeting at the seat of government. (See 2017 Senate Joint Res. 1.) Thus, an extraordinary session is only convened during the definite times throughout each biennial session period when the Legislature is ***not*** in a session provided by law.

In sum, the Legislature's many errors and omissions in constructing the law governing sessions lay bare the fact that, at least as Article IV, Section 11 of the Constitution is concerned, the Legislature does ***not*** remain in continuous session throughout each biennium. Therefore, the absence of a specific provision by law for the Extraordinary Session renders it unconstitutional.

6. Even if the Legislature could convene extraordinary sessions generally, the Legislature could not legally convene the Extraordinary Session because the regular session had already terminated by adjournment *sine die*.

Extraordinary sessions are not part of the Legislature's regular session, and there is no "continuous" session of which they could be part. However, even if extraordinary sessions could generally be included in either, the Extraordinary Session was invalid because the Legislature had already adjourned *sine die*.

The Legislature implies otherwise only by ignoring the meaning of "*sine die*," arguing that it "did not adjourn *sine die*...until Monday, January 7, 2019." (Leg. MTD Br. at 14-15, 18.) However, *sine die* means "[w]ithout day; without assigning a day for a further meeting or hearing. Hence a legislative body adjourns *sine die* when it adjourns

without appointing a day on which to appear or assemble again." *Black's Law Dictionary* 1385 (6th ed. 1990).[9]

January 7, 2019 was ***not*** a day for a further meeting of the 2017-18 Legislature. Rather, it was only the date upon which the 2017-18 biennial session period ended and the 2019-20 biennial session period began. 2017 Senate Joint Res. 1. The *sine die* adjournment—and, thus, the termination of the entire 2018 session—occurred more than half a year before the Extraordinary Session was scheduled or convened—on the day that the Legislature held its last scheduled regular session meeting. (See Gov. T.I. Br. at 20-22.) As such, under no conceptualization of the session was there any active, law-provided session from which the Extraordinary Session could spring.

B. Even an expansive reading of the Constitution does not authorize the Extraordinary Session.

As described, *supra*, in Section I.A of this brief, the Constitution's language regarding the time of legislative meetings is meant to be restrictive. (See also Pls' T.I. Br. at 5, 13-19.) The phrase "at such time as shall be provided by law" in article IV, § 11 means that the Legislature may only meet in a session actually commenced at a time provided by law, and the Extraordinary Session failed to meet this standard.

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[9] *See also, e.g.*, Mary E. Burke, *The Wisconsin Partial Veto: Past, Present and Future*, 1989 Wis. L. Rev. 1395, 1432 (1989) ("The legislature adjourns '*sine die*' when it does not specify before adjourning a date on which members will reconvene."); *State ex rel. Martin v. Zimmerman*, 233 Wis. 442, 289 N.W. 662, 666 (1940); Wisconsin Assembly Chief Clerk, 1969, *Wisconsin Assembly Manual*, A-45 (first published Assembly manual following last amendment of Wis. Const., art. IV, § 11, providing that the Regular Session continues "until sine die adjournment of such Session")(attached to Affidavit of Counsel, Doc. 99, as Exhibit G).

The Legislature fails to articulate a plausible alternative legal theory. However, even if this Court were to decide, regardless of the above, that the Constitution meant something vastly more expansive—for example, that the law must provide ***for a mechanism determining*** the time of a session's commencement or the ***general time*** that the Legislature shall actually meet—it still should find that the Extraordinary Session was *ultra vires* because no law accomplished either of these outcomes. (See Gov. T.I. Br. at 22-24.)

The Legislature relies on Wis. Stat. § 13.02(3) as the only statute in the daisy chain of its legislative authority. However, Subsection (3) does not provide by law ***any*** session meeting times, let alone a time for an extraordinary session. All that it creates is a meeting of the joint committee on legislative organization and a mandate for that committee to develop and submit to the Legislature "a work schedule for the legislative session." The subsection does not even require the Legislature to ***pass*** the resulting joint resolution, let alone to adhere to the schedule. Thus, subsection (3) does not yield any session meeting times of any kind. Neither does it provide by law any other schedule determinations. Section 13.02(3) of the Wisconsin Statutes thus does not satisfy the Constitution's mandate to provide, by law, the time for the Legislature's meeting in session.

Moreover, the work product that is required by Wis. Stat. § 13.02(3) is a "work schedule." "Schedule" is defined as "a plan of procedure, usually written, for a proposed objective, especially with reference to the sequence of and time allotted for each item or operation necessary to its completion" or "program;

especially a procedural plan that indicates the time and sequence of each operation."[10] In other words, the subsection requires specific, set times for each item.

The actual joint resolution that resulted from this subsection in the 2017-18 biennium provides a work schedule for the floor periods of the regular session. See 2017 Senate Joint Res. § 1(1), (2), (3) (b)-(x), (4), (5)(b)-(c), (6); 2. However, what it provides as far as ***extraordinary*** sessions are concerned can***not*** reasonably be considered a "work schedule" because there are no specific, set times or a program. In fact, the resolution only states that an extraordinary session ***may*** be called when ***there is no schedule***. See 2017 Senate Joint Res. § 1(3)(a). As a result, neither a work schedule for the Extraordinary Session, nor a mechanism determining the time of its commencement, nor even the general time that it should be held, are provided by Wis. Stat. § 13.02 or any other law. The session thus violated even an expansive interpretation of Article IV, Section 11 of the Wisconsin Constitution.

C. The Legislature's right to determine the rules of its own proceedings does not exempt it from Constitutional scrutiny.

The Legislature also distorts the applicability of Article IV, Section 8 of the Wisconsin Constitution, and the case law that has interpreted it. (Leg. MTD Br. at 5.) As Plaintiffs have demonstrated, the right of the Legislature to determine the rules of its own proceedings does not exempt the Legislature from its duty to conform its rules and

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[10] See https://www.dictionary.com/browse/schedule; https://www.merriam-webster.com/dictionary/schedule; *see also Black's Law Dictionary* 1344 (6th ed. 1990), defining "schedule" as "[a]ny list of planned events to take place on a regular basis such as a train schedule or a schedule of work to be performed in a factory."

actions to the Constitution, or this Court from its duty to enforce the Constitution as to those rules and actions. (See Pls' T.I. Br. at 11-13. *See also Milwaukee Journal Sentinel v. Wisconsin Dep't of Admin.*, 2009 WI 79, ¶¶ 18-20, 319 Wis. 2d 439, 456-58, 768 N.W.2d 700, 708-09 ("[E]ven if the statute might otherwise be characterized as a legislative rule of proceeding, we may interpret the statute and apply it to the legislative action to determine whether that action complies with the relevant constitutional mandates.")

D. Previous extraordinary sessions do not help the Legislature's argument.

The Legislature seeks support from the simple fact that it has previously conducted extraordinary sessions under similar protocol to the Extraordinary Session. (Leg. MTD Br. at 6-7.) That is irrelevant. These previous sessions do not negate the plain meaning—nor could they even inform an ambiguous meaning—of Article IV, Section 11's requirement that the Legislature's meetings be at a time provided by law except when called by the governor in a special session. This is particularly so because Article IV, Section 11 predated the first extraordinary session by nearly 100 years. Further, the vast majority of these sessions did not occur after the *sine die* adjournment of the regular session, as did the Extraordinary Session. Most importantly, these previous sessions are not being challenged in this action.

Certain previous extraordinary sessions are germane, however, to this dispute. On at least two occasions, the Legislature demonstrated that it understands the Constitutional strictures on extraordinary sessions and that complying with them is not beyond its capabilities. *See*, Wis. Stat. § 196.497(10(c), 1987 Act 4 (creating, for the duration of a single biennium, Wis. Stat. § 13.02(3m)). (See also Gov. T.I. Br. at 19-20.)

These enactments starkly demonstrate Legislative efforts to comply with Constitutional standards—standards which were simply not followed for the Extraordinary Session.

E. It is the Legislature, not Plaintiffs, that presents an untested and unworkable theory of law.

Were the Court to agree with the Legislature's argument that it is continuously in session for every moment of its biennial session period, absurd consequences would result. For instance, all legislators would be privileged from arrest (except in cases of treason, felony and breach of the peace) and immune to any civil process, for as long as they held office, no matter how many years or decades they serve. Wis. Const. art. IV, § 15.

Similarly, any action or proceeding in any court or any commission in which a legislator is a witness, party or an attorney for any party could be continued until the legislator leaves office. Wis. Stat. § 757.13. Even a legislator arguing for a longer continuance under this statute conceded that the "session" ends on "the last day of the last general business floor period." *State v. Chvala*, 2003 WI App 257, ¶ 7, 268 Wis. 2d 451, 458, 673 N.W.2d 401, 404. There is no support for the Legislature's position that "session" can be extended to include, uninterrupted, the entire two-year biennial session period.

II. Plaintiffs and the Governor have standing to challenge the procedure by which 2018 Acts 368, 369 and 370 were enacted and 82 appointments confirmed, and therefore the validity of those enactments and appointments.

A. The Legislature did not move to dismiss for lack of standing.

In its provisional Motion to Dismiss, the Legislature identifies a single basis for its motion: "to dismiss the complaint for failure to state a claim upon which relief can be granted." The Legislature did not identify any other bases for its motion. Nevertheless, in its supporting brief, the Legislature argued for dismissal based on lack of standing (as a type of lack of jurisdiction, *see* Leg. MTD Br., pp. 12-13, 21-27). Because the Legislature filed no motion to dismiss for lack of standing, argument contained in the brief should not be considered.[11]

Should the Court nevertheless consider the standing arguments, however, the Plaintiffs have standing at least as taxpayers, and as individuals subjected to a constitutional violation constituting *per se* harm. *See Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") The Governor will leave it to the Plaintiffs to expand on their own standing to pursue their claims.

B. The Governor has standing under the doctrine of *parens patriae.*

While the Governor is nominally a defendant here, sued in his official capacity, he has explicitly aligned himself in this case with the Plaintiffs and the citizens of this

[11] Moreover, standing is not a jurisdictional requirement in Wisconsin courts, unlike in federal courts, which can hear only "cases" and "controversies." *See McConkey v. Van Hollen*, 2010 WI 57, ¶ 15, 326 Wis. 2d 1, 12, 783 N.W.2d 855, 860 (citing *Zehetner v. Chrysler Fin. Co.*, 2004 WI App 80, ¶ 12, 272 Wis.2d 628, 679 N.W.2d 919).

state, whose constitutional rights have been violated by the Legislature's lawless efforts to enact laws during a meeting that had no basis in law to be held. (*See, e.g.*, Gov. T.I. Br.) Along with his Answer, he included a Cross Claim joining the Plaintiffs on their claim. (Doc. 114) The Governor can be re-aligned in the caption as a plaintiff, and the Legislature, once permitted to intervene as the parties have stipulated, will serve as the appropriate defendant. With this alignment of parties, even in the unlikely event that the Court finds that all of the Plaintiffs lack standing, this challenge may continue.

The Governor has both the power to bring claims such as those brought here, and the standing to pursue them. Under Wis. Stat. § 14.11(1), "the governor, whenever in the governor's opinion the rights, interests or property of the state have been or are liable to be injuriously affected, may require the attorney general to institute and prosecute any proper action or proceeding for the redress or prevention thereof..." It is the Governor's opinion that the rights, interests and property of the state, and its citizens, have been and are liable to be injuriously affected by the Legislature's *ultra vires* meeting.

The Wisconsin Supreme Court recognized long ago that Wis. Stat. § 14.11 recognizes that the Governor has both the power and the standing to direct the attorney general to prosecute a *parens patriae* action. *State ex rel. Reynolds v. Smith,* 19 Wis. 2d 577, 585-86, 120 N.W.2d 664 (1963). In *Reynolds,* Attorney General Reynolds, at the direction of Governor Gaylord Nelson, had instituted a lawsuit in federal court contending that the legislature violated the Fourteenth Amendment of the United States Constitution in its reapportionment of legislative and congressional districts. When the state treasurer

refused to sign a check to pay certain expenses authorized by the Attorney General in the federal case, the Wisconsin Supreme Court was called upon to determine whether the Attorney General could authorize the expenditure. It ultimately determined he could, *id.* at 587, and in the process answered the question as to whether the Governor could authorize the Attorney General to bring the underlying federal lawsuit in the first place. The Wisconsin Supreme Court held that he could, as follows:

> We, therefore, hold that the governor is authorized under sec. 14.12 [now 14.11] to direct the attorney general to commence a *parens patriae* type of action to enforce the constitutional rights of its citizens..."

It is of no consequence that the Governor is represented by special counsel, not the Attorney General, in this action. Under Wis. Stat. § 14.11(2), the Governor may choose to be represented by special counsel to act instead of the attorney general, "if in the governor's opinion the public interest requires such action." Wis. Stat. § 14.11(2)(a)2. He has, as demonstrated by all of the filings in this case, directed his special counsel to proceed in this action "for the redress or prevention" of the constitutional violations of the Legislature on the citizens of the state. Just as the Governor may direct the Attorney General to pursue litigation *parens patriae*, he may also direct special counsel, as here.

Reynolds also left no doubt as to the Governor's standing to pursue such a case on behalf of the state's citizens: "We deem that the state does have an interest in any litigation which it brings in the capacity of *parens patriae* to enforce constitutional rights of its citizens." *Reynolds,* 19 Wis. 2d at 585. The state is a proper party to protect the constitutional rights of its citizens, regardless of whether such claims arise under the federal constitution or the state constitution. *Id.* at 586.

C. The Governor has standing as the person serving as the Governor and as head of the Executive Branch, both of which have been harmed.

To satisfy the standing requirement in Wisconsin, a plaintiff must allege that the action at issue directly caused injury to a legally protected interest of the plaintiff. *Milwaukee Brewers Baseball Club v. Wis. Dep't of Health and Soc. Servs.*, 130 Wis. 2d 56, 65, 387 N.W.2d 245, 248-49 (1986); *Wisconsin's Envt'l. Decade, Inc. v. Pub. Serv. Comm'n of Wis.*, 69 Wis. 2d 1, 10, 230 N.W.2d 243, 248 (1975). The law of standing is construed liberally, and even a "trifling interest" may be sufficient where actual injury is demonstrated. *Milwaukee Brewers Baseball Club*, 130 Wis. 2d at 64, 387 N.W.2d at 248; *Fox v. Wis. Dep't of Health and Soc. Servs.*, 112 Wis.2d 514, 524, 334 N.W.2d 532, 537 (1983).

The Legislature misconstrues the illegal action asserted here, arguing that "multiple provisions" are challenged and insisting therefore that Plaintiffs must allege facts to establish standing for each provision. (Leg MTD Br. at 22) To be clear, the illegal action asserted here is the meeting of the Legislature in December 2018 dubbed the "2018 Extraordinary Session," at which numerous acts were purportedly taken—laws passed and appointments confirmed. If the meeting was illegitimate, then all actions taken during the meeting were likewise illegitimate and have no force—they are null. *See State ex rel. Wisconsin Dev. Auth. v. Dammann*, 228 Wis. 147, 277 N.W. 278, 279, on reh'g, 228 Wis. 147, 280 N.W. 698 (1938) ("the attempted passage of the bill …was a nullity. It was as a thing not done at all; and not an act that was but defectively performed by a body possessing the power and the right to perform it perfectly.") As the United States Supreme Court has explained, "The Constitution…is concerned with

means as well as ends. The Government has broad powers, but the means it uses to achieve its ends must be 'consist[ent] with the letter and spirit of the constitution.'" *Horne v. Dep't of Ag.*, ___ U.S. ___, 135 S. Ct. 2419, 2428 (2015) (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 421, 4 L.Ed. 579 (1819)). Even "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way." *Id.* (quoting *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 416, 43 S. Ct. 158 (1922).

When a candidate claiming to have been chosen by the Legislature as the winner in an election for Michigan Secretary of State brought a petition to the Michigan Supreme Court for being denied that office, the Michigan Attorney General contended that the meeting at which the candidate was chosen as winner, a "joint convention" of the Legislature, was illegal. *Wilson v. Atwood*, 270 Mich. 317, 320, 258 N.W. 773, 774 (1935). The Michigan Supreme Court agreed. It did not simply reverse the election declaration made at that convention. Instead, it held that *all of* "[t]he acts of the so-called 'joint convention' and of the committees appointed by it were...a nullity....The entire proceedings were fatally defective. There was no joint convention." *Id.* at 321, 327. It follows here that injury need not be shown as to each law and confirmation borne of the Extraordinary Session; a party suffering injury as a result of any one action taken during a fatally defective meeting has standing to challenge the meeting and all actions taken in it. That is, a single action or inaction compelled as a result of a purported but challenged meeting of the Legislature is an injury sufficient to confer standing to challenge the legitimacy of that meeting.

The effects of the Extraordinary Session not only directly affect the Plaintiffs and the citizens of the state generally, but also many of the actions and powers newly compelled, interfered with, and forbidden by the enactments and confirmations at that meeting purport to bind the Governor and others within the Executive Branch, as detailed previously (Gov. T.I. Br. at 3-8 and 26-27, and accompanying Affidavits (Doc. 99, Exs. A through E). Those effects range from impeding the Executive Branch from controlling litigation on behalf of the state as dictated by the Constitution and making appointments, to diverting administrative agency staff and other resources from their core missions--including provision of services to citizens and other taxpayers--and instead putting those resources toward make-work, to interfering with agency administration of federal programs. In short, the effect of the Extraordinary Session is that services to the public are being disrupted, diminished, delayed, and even denied, and tax funds are being used to do this. The Governor, the exercise of his powers and the powers of his agencies being compelled, interfered with and forbidden, has standing to challenge the legitimacy of the meeting of members of the Legislature referred to as the Extraordinary Session because all of these harms result from laws purported to have been passed at fatally defective proceedings.

The object of the standing doctrine is to ensure that the party seeking relief has sufficient stake in the outcome as to create the adverseness needed to present an argument that illuminates the constitutional questions. *See Moedern v. McGinnis*, 70 Wis. 2d 1056, 1064, 236 N.W.2d 240 (1975). It can hardly be questioned that the Governor and the administrative agencies of the Executive Branch have sufficient stake in the

challenge to the Constitutional legitimacy of the meeting dubbed the "December 2018 Extraordinary Session" and actions taken therein.

III. The parties have stipulated to the Legislature's permissive intervention, making its indispensable party argument moot.

The Legislature argues that it is an indispensable party. The parties have stipulated to its intervention pursuant to Wis. Stat. § 803.09(2). (Tseytlin letter, Doc. 112) Based on that stipulation, in anticipation of the Legislature being granted such status on that basis, and in the interests of the efficient administration of justice, the Governor does not present argument on the Legislature's indispensable party argument, as it is moot.

CONCLUSION

For the reasons stated in this brief, and the relevant arguments and evidence contained in the Governor's Response to Plaintiffs' Motion for Temporary Injunction (Doc. 98) and accompanying Affidavits (Doc. 99, Exs. A through E), the Court should deny the Legislature's Provisional Motion to Dismiss.

Respectfully submitted this 6th day of March, 2019.

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1971 Senate Bill 60

Date published:
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CHAPTER 15, Laws of 1971

AN ACT to amend 13.02 (2); and to create 13.02 (intro.) and (3) and (4) of the statutes, relating to annual sessions of the legislature.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 13.02 (intro.) of the statutes is created to read:

13.02 (intro.) The legislature shall meet annually.

SECTION 2. 13.02 (2) of the statutes is amended to read:

13.02 (2) The regular session of the legislature shall commence at 2 p.m. on the first Tuesday after the 15th day of January in each ~~odd-numbered~~ year unless otherwise provided under sub. (3).

SECTION 3. 13.02 (3) and (4) of the statutes are created to read:

13.02 (3) Early in each biennial session period, the joint committee on legislative organization shall meet and develop a work schedule for the legislative session, which shall include at least one meeting in January of each year, to be submitted to the legislature as a joint resolution.

(4) Any measures introduced in the regular annual session of the odd-numbered year which do not receive final action shall carry over to the regular annual session held in the even-numbered year.
